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IN THE

Supreme Court of the United States

October Term, 1950.

No. 399.

JACK H. BREARD,
Appellant,

v.

CITY OF ALEXANDRIA,
Appellee.

Appeal From the Supreme Court of the State of Louisiana.

Appellant's Petition for a Rehearing.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the above-named appellant, Jack H. Breard, and respectfully petitions for a rehearing of the decision in the above-entitled cause, dated June 4, 1951, on the following grounds:

1. *The decision of the majority, affirming the judgment of conviction appealed from, misconceives the true nature and effect of Alexandria Penal Ordinance No. 500.* Granted that all regulatory legislation is prohibitory in a limited sense, it does not follow that legislation, not in absolute terms prohibitory, may not be prohibitory in its operation and effect. With all due deference, the so-called Green River ordinance, of which Alexandria Penal Ordinance is typical, cannot be regarded otherwise than as a prohibitory

ordinance in the strictest sense of the word; and the growth of the Green River type ordinance in this country, far from evidencing "its adaptation to the needs of the many communities which have enacted it," actually attests its drastic and prohibitory effect on house-to-house solicitation.

As the learned Chief Justice observed in his dissenting opinion, "the ordinance is a flat prohibition of solicitation." This view accords with the view expressed by the Supreme Court of Louisiana that the ordinance "is a prohibition of an activity on local territory" (R. 21), and also with the general consensus of opinion of those who have considered the problem here presented.[1] What recommends the Green River type ordinance to municipal officials, local business interests, and householders jealous of their privacy (but not sufficiently so to post their premises), is the fact that the permissive feature of the ordinance is merely a sop to allay constitutional objection, and the ordinance, in its practical operation and effect, bars all manner of solicitation on private premises. In other words, the Green River type ordinance is not the result of conscientious functioning by responsible municipal officials seeking to curb the abuses of house-to-house solicitation "while preserving complete freedom for desirable visitors to the house", but is the result of a deliberate attempt to usurp the prerogative of the individual householder and to outlaw a legitimate business activity. Certainly, such ordinance cannot fairly be said to represent "an adjustment of constitutional rights", with its proponents yielding "something to the reasonable satisfaction of the needs of all."

2. *The decision of the majority is based upon an erroneous assumption as to the nature of the appellant's business and the effect of the Ordinance thereon.* Contrary to the assumption made in the opinion of the majority,

1. See Brief for Appellant, pages 14, note 4, pages 16-17, note 6, pages 26-28, notes 12-14.

other methods of circulation are *not* open to the appellant, if the Court's decision stands.

As the record shows (R. 7) the appellant is the regional representative of Keystone Readers Service, Inc. which is engaged in *house-to-house solicitation* of subscriptions for nationally known magazines. Keystone engages in this business pursuant to contracts with various publishers of such magazines. House-to-house solicitation of magazine subscriptions is the *only* business of Keystone and its solicitors. In other words, Keystone and its solicitors are not engaged in the business of obtaining magazine subscriptions by various business methods, but are engaged exclusively in the business of obtaining such subscriptions by house-to-house canvass.

As the record further establishes (R. 10, 14A), there are three methods of circulating the American periodical press, namely, field subscription solicitation, direct mail subscription solicitation, and single copy sales over newsstands. Each of these methods is utilized to the fullest by publishers in obtaining circulation of national periodicals; and field subscription solicitation regularly accounts for over 50% of the subscriptions received and is responsible for approximately 30% of their total annual circulation (R. 10). If therefore, Alexandria Penal Ordinance No. 500 may validly be applied to magazine subscription solicitation, the appellant and others similarly situated, are out of business in all Green River ordinance towns and a substantial portion of the total circulation of American magazines and periodicals is placed in jeopardy (R. 10, 14A).

3. *The decision of the majority fails to recognize the impact of the ordinance upon interstate commerce.* The majority opinion holds that the ordinance does not violate the Commerce Clause because the ordinance does not impose a tax or license fee upon interstate business, but "falls in the classification of regulation". This would create an anomalous and unrealistic situation.

In a long line of decisions, commonly known as the "Drummer Decisions" beginning with *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), and culminating with *Nippert v. City of Richmond*, 327 U. S. 416 (1946), this Court consistently has protected the door-to-door solicitor or drummer of interstate business from state or municipal taxation or license fee or bond requirements. Notwithstanding this, the majority opinion of the Court in the present case would permit a city to prohibit the *same* solicitor or drummer of interstate business from soliciting such business.[2] In other words, the established rule that interstate commerce cannot be subjected to undue burdens or discrimination is inapplicable because the regulation purports to be an exercise of the police power instead of the taxing power. But this Court pointed out years ago "that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power".[3] As Mr. Justice Clark pointed in *Dean Milk Co. v. City of Madison*, 340 U. S. 349 (1951), at page 354:

> "* * * A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. * * *"

If a state or municipality is precluded from erecting a trade barrier against interstate commerce by an exercise of its taxing power but can do so by the exercise of its police power, then the protection afforded interstate com-

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2. House-to-House Solicitors of Interstate Business were involved in the Drummer cases. See *Brennan v. Titusville*, 153 U.S. 289 (1894); *Crenshaw v. State of Arkansas*, 227 U.S. 389 (1913); *Realsilk Hosiery Mills v. City of Portland*, 268 U.S. 325 (1925); *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

3. Mr. Justice Holmes in *Kansas City Southern R. Co. v. Kaw Valley Drainage District*, 233 U. S. 75, 79 (1914). See also opinion of Mr. Justice Reed in *Morgan v. Virginia*, 328 U. S. 373 (1946) at page 380. Also see *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 780 (1945).

merce by the Commerce Clause would seem more tenuous than a rope of sand. Interstate commerce could hardly survive under such circumstances. Yet, that is precisely the effect of the majority opinion in the present case.

By its failure to test the ordinance according to its actual and potential operation and effect on interstate commerce, the majority opinion of this Court failed to recognize the fact that the ordinance results in gross discrimination against interstate commerce. In doing so, the majority opinion failed to follow the admonition of Mr. Justice Reed in *Best & Co. Inc. v. Maxwell*, 311 U. S. 454 (1940) at page 455:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against Interstate Commerce * * *."

The Green River Ordinance is not aimed at the solicitor of interstate business who sells to local manufacturers or merchants or dealers, but is aimed at the solicitor of interstate business who sells directly to the consumer.[4]

The house-to-house solicitor of interstate business, who sells directly to the consumer, is in direct competition with the local retailer. Accordingly, the effect of the Green River Ordinance, actually and potentially, is to prevent the interstate competitor of the local retailer from selling his goods, wares, or magazines, in any community in which the Green River Ordinance is in force. Unquestionably, this is gross discrimination against interstate commerce.

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4. This was largely true of the Drummer Cases. See, for example, the ordinance in *Brennon v. Titusville*, 153 U.S. 289 (1894), which expressly exempted from the licensing ordinance persons selling by samples to manufacturers or licensed merchants or dealers. Some products, like heavy machinery, are not sold house-to-house, but to dealers or manufacturers. On the other hand, many articles, particularly household articles and magazines, are sold directly to consumers by house-to-house solicitation.

In the Drummer Cases, this Court took judicial notice of the fact that the ordinances, as applied to solicitors of interstate business, resulted in discrimination against interstate commerce in favor of local competing business, and that provincial interests and local political power were at their maximum weight in bringing about the acceptance of such ordinances. As this Court pointed out with respect to the ordinance in *Nippert v. City of Richmond*, 327 U. S. 416 (1946) at page 434:

> "* * * Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, *we cannot be unmindful*, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. * * *" (Emphasis ours.)

If this Court "cannot be unmindful" that the license ordinances in the drummer cases would discriminate against interstate commerce, there would seem to be no reason why the Court should not be equally mindful of the fact that the necessary effect of the Green River Ordinance is to create discrimination against interstate business, in favor of local competing business. "Whether or not it was so intended, those are its necessary effects". (See *Nippert* Case, supra, page 434.) In the drummer cases this Court, by judicial notice, recognized that provincial interests and local political power were at their maximum weight in bringing about the drummer type of ordinances, so there would seem to be no reason why the Court should not be equally as astute in recognizing a similar situation in the case of the Green River Ordinances.

As indicated above, the Green River Ordinance does not leave the house-to-house type of sellers on the same

basis as local sellers. The ordinance eliminates the only personal contact that can be had between the out-of-state seller and the consumer. In effect, the majority opinion of this Court would relegate the out-of-state direct to the consumer seller, to a mail order business. This is true, because the opinion suggests that the other usual methods of soliciting remain open. However, this is flatly contrary to what this Court said in *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887). In that case this Court pointed out that the out-of-state manufacturer or merchant did not have to open up a warehouse or store in every state in which he desired to obtain trade, nor was he relegated to the solicitation of orders through the mail. The Court pointed out that the merchant or manufacturer could not be compelled to take such inconvenient and expensive steps. In so holding, this Court stated as follows, at page 495:

> "The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself, or by someone employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. * * *"

Accordingly, the appellant respectfully submits that the majority of the Court in the present case failed to recognize the exclusionary and discriminatory impact of the Green River Ordinance upon interstate commerce, and in so doing failed to follow the usual tests laid down by the Court pertaining to this subject.

4. *The decision of the majority cannot be squared with the Constitutional guaranty of freedom of the press.* The First Amendment provides expressly that Congress shall make "*no* law * * * abridging the freedom of speech or of

the press"; and while it may be conceded that the First Amendment and the Fourteenth Amendment, making applicable the provisions of the First Amendment to State and municipal legislation, "have never been treated as absolutes", this Court has nevertheless held, time and time again, that the First Amendment means what it says, and that freedom of speech and freedom of the press cannot be abridged, save in situations where there is grave and immediate danger to the public interest, and then only where the challenged legislation is narrowly drawn to prevent the supposed evil. With all due deference, the majority of the Court in this case has not only not been "astute to examine the effect" of Alexandria Penal Ordinance No. 500, but has failed properly "to weigh the circumstances" and, "to appraise the substantiality of the reasons advanced in support of" the Ordinance.

If this Court was able to say in *Schneider v. State*, that "Frauds may be denounced as offenses and punished" and "Trespasses may similarly be forbidden", and that "If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press" (308 U. S. 147, 164), how can this Court now say that "some householders' desire for privacy" outweighs the right of publishers and their representatives to go from door-to-door soliciting subscriptions to their magazines and periodicals, as well as the great public interest in seeing that all methods of press circulation are maintained, to say nothing of the rights of the large number of persons who regularly purchase their magazines in this manner.

Again, having regard for this Court's decisions in the *Struthers, Marsh* and *Tucker* cases, how can the reasons advanced in support of the "regulations" therein involved

be appraised as any less substantial than the reasons now advanced in support of the present ordinance. And why, if the ground of the *Struthers* decision was "that the home owner could protect himself from such intrusion by an appropriate sign" (see *Kovacs v. Cooper*, 336 U. S. 77, 86 (1949)), cannot such an accommodation be made of the conflicting interests in this case, and the challenged legislation narrowly redrawn to this effect, particularly when the majority opinion herein states that "This case calls for an adjustment of constitutional rights" and "Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all". In this connection, it should be emphasized that no one here has urged or is attempting "to force a community to admit the solicitors of publications to the home premises of its residents" who have indicated that they "are unwilling to be disturbed".

Finally, it may be asked whether, despite the agreement of the majority "that the fact that periodicals are sold does not put them beyond the protection of the First Amendment", the "commercial feature" of magazine subscription solicitation was a material consideration in the ultimate decision reached in this case. In view of this Court's statement in the *Grosjean* case that the "predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information", and that the "newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity" (297 U. S. 233, 250 (1936)), we do not understand that the profit motive in the business of publishing and distributing the American periodical press entitles its representatives to less protection under the First Amendment than religious colporteurs. However, if this Court entertains a contrary view, request is respectfully made for leave to reargue this important point.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that this petition for rehearing be granted, and that, upon such rehearing, the judgment appealed from be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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